

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TOBY MEAGHER, through his Power of
Attorney, GERALDINE MCNAMARA,

Plaintiff,

vs.

KING COUNTY, and OFFICERS RODNEY
PRIOLEAU, BRIAN O'FARRELL, THERON
MCCAIN JR., RONNY LEE KINTNER, J.
GARCIA, GREGG CURTIS, P.E.S. MICHAEL
KILBOURNE and DEFENDANT DOES 1-10,

Defendants.

No. 2:19-cv-00259-JLR

AND

STIPULATED MOTION FOR ORDER
RE: RULE 35 EXAMINATION

NOTED FOR CONSIDERATION:

January 24, 2020 (LCR 7(d)(1))

COMES NOW, the above-captioned parties, by and through their undersigned attorneys
whose signatures are set forth below, and agree to and stipulate to an examination pursuant to
Federal Rule of Civil Procedure 35 under the conditions set forth below.

The above Civil litigation action alleges a number of claims including but not limited to
excessive and unlawful force, negligent supervision and retention, battery, intentional infliction
of emotional distress, negligent infliction of emotion distress, disability discrimination and
respondeat superior. The plaintiff claims injuries and medical conditions in connection with

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1 these claims including but not limited to physical harm, psychological harm, mental distress,
2 humiliation, embarrassment and fear.

3 The injuries and mental conditions are alleged to be the result of negligent, tortious,
4 wrongful and/or unlawful conduct of the defendants. The defendants have requested an
5 examination pursuant to FRCP 35. A Rule 35 exam requirement is that there be a mental or
6 physical condition "in controversy". The parties stipulate that all requirements for a Rule 35
7 examination are satisfied. Accordingly, the parties, through their undersigned counsel, stipulate
8 to Defendants' requested Rule 35 examination with the following terms and conditions:

9 1. Plaintiff's examination will be performed by Mark McClung, M.D. and will take place
10 on two (2) separate dates, Wednesday, February 12, 2020 at 9:00 a.m., and on Tuesday, February
11 25, 2020 at 9:00 a.m. The examinations will take place at Dr. McClung's office located at 1200
12 Fifth Avenue, Suite 2010, Seattle, WA 98101. The examination sessions will last 2.5 hours, not
13 including the time it takes for plaintiff to complete testing, *but no longer than 3 hours per*
14 *day.*

15 2. The examination of Plaintiff by Dr. McClung will consist of a question and answer
16 session. Dr. McClung will not be allowed to conduct a physical examination of the Plaintiff.

17 3. The manner, conditions, and scope of the examination are as follows:

18 a. Most of the evaluation time will be conducting a detailed face-to-face
19 psychiatric interview.

20 b. Various tests of cognitive capacity (memory, attention, concentration,
21 ability to understand/follow verbal instructions, organize, plan, etc.) may be
22 performed, such as the Montreal Cognitive Assessment, Frontal Assessment
23 Battery, Trails A and B, Digit Symbol, TOMM, or Rey Figure Drawing. All

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1 are verbal or written questionnaires. Which specific questionnaires are utilized
2 will depend on the findings from the psychiatric interview.

3 c. Diagnostic screening questionnaires may also be administered, such as the
4 MMPI-2F, the SIRS-2 or the PAI, designed to assess patterns of psychiatric
5 symptoms.

6 d. Some neurological assessment will be included in the exam, which would
7 be the typical neurologist's office examination, testing reflexes, muscle
8 strength, coordination, facial movements, etc. This would not involve any
9 invasive procedure, nor would he need to remove clothing; it involves only
10 asking the evaluatee to perform certain movements.

11 e. Usual and customary practice is to have only the evaluator and evaluatee in
12 the room together. I will allow one person from the evaluatee's attorney's office
13 to attend to record the interview; however, if they begin to adversely affect or
14 interrupt the evaluation, such as interrupting me, instructing to the evaluatee, or
15 communicating verbally or nonverbally with the evaluatee, etc., then the
16 evaluation will be stopped.

17 f. The evaluatee may request breaks at any time during the evaluation.
18 *Should the evaluation reach 3 hours, plaintiff's representative
will end the session.*

19 The foregoing is true and correct to the best of my knowledge under penalty of perjury
20 and the laws of the United States and the state of Washington.

21 4. Plaintiff shall have the right to have a representative person present at the
22 examination. However, the representative shall not participate in the examination. This
23 representative will be Anita Fahnlander, R.N. or

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1 _____, or some other qualified representative if neither of the
2 above is available. Plaintiff shall have the right to make an audio or videotaped recording of the
3 examination at no extra charges by the Examiner. Said recording(s), if any, shall be made in an
4 unobtrusive manner. Plaintiff shall provide a copy of any such recording(s) in response to proper
5 discovery request. Plaintiff's counsel ^{has already notified} ~~shall notify~~ counsel for Defendants ~~at least five (5)-~~
6 ~~business days in advance of the examination if~~ ^{that} audio recording and/or videotaping will occur.
7 Additionally, no later than three (3) business days before the examination, Plaintiff's counsel
8 shall provide to Defendants counsel the name of the representative who will attend the
9 examination with plaintiff if that representative is not one of the two individuals specifically
10 referenced above.

11 5. No questions shall be asked of the Plaintiff by the Examiner or staff related to
12 negligence, legal liability, opinions of law, and/or issues of law such as responsibility,
13 culpability, and/or liability for any injuries.

14 6. No invasive tests or imaging shall be done.

15 7. Examiner shall make a written report of the exam; within 7 days of receiving the
16 report, the attorney for the Defendants shall cause a copy of the report, and the Examiners
17 Curriculum Vitae to be delivered to plaintiff's counsel.

18 8. No person, other than Plaintiff and Dr. McClung, shall participate in any way in the
19 examination, evaluation or diagnosis (except technical staff who may administer the MMPI).
20 Plaintiff and any representative will be asked to present identification for verification purposes.
21 Defense counsel or representative thereof shall not attend the examination.

22 9. The examination will include the administration of the testing referenced in paragraph

23 3.

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1 10. A copy of this Stipulation shall be given to the Examiner before the examination.
2

3 The parties stipulate to a Rule 35 examination under the foregoing terms and conditions.
4

5 Date: 1/24/2020

Date: 1/24/20

6 DANIEL T. SATTERBERG
7 King County Prosecuting Attorney

Peterson Wampold Rosato Feldman Luna

8 By: J. R. Zeldenrust
9 JOHN R. ZELDENRUST, WSBA #19797
10 Senior Deputy Prosecuting Attorneys
Attorneys for Defendant King County
Email: John.Zeldenrust@kingcounty.gov

By: [Signature]
TOMAS A. GAHAN, WSBA # 32779
Attorneys for Plaintiff

11
12 **ORDER**

13 Based on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED that an
14 examination of Plaintiff by Mark McClung shall occur pursuant to Rule 35 in accordance with the
15 terms described above.
16

17 DATED this 27 day of January, 2020, at Seattle, Washington.

18 [Signature]
19 Hon. James L. Robart
20 United States District Court
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